

CABLE TELEVISION DIVISION

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

STATE OF HAWAII

In the Matter of)	
)	
TIME WARNER ENTERTAINMENT)	ORDER NO. 326 REGARDING TIME
COMPANY, L.P.)	WARNER ENTERTAINMENT
)	COMPANY, L.P.'S MOTION FOR
Franchise Amendment for Activation of a)	RECONSIDERATION OR
6 th Access Channel for the Oahu Cable)	CLARIFICATION OF DECISION AND
Franchise Area.)	ORDER NO. 320 DATED JUNE 8, 2005
_____)	

ORDER NO. 326 REGARDING TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR RECONSIDERATION OR CLARIFICATION OF DECISION AND ORDER NO. 320 DATED JUNE 8, 2005

I. INTRODUCTION

- A. On June 8, 2005, the Director of Commerce and Consumer Affairs (hereinafter referred to as "**Director**" or "**Department**") issued Decision and Order No. 320 ("**D&O 320**") which among other things, required Time Warner Entertainment Company, L.P. ("**TWE**") to designate and provide for activation to the Director or the Director's designee, a 6th access channel for a one-year period.
- B. On June 17, 2005, TWE submitted Time Warner Entertainment Company, L.P.'s Motion for Reconsideration or Clarification of Decision and Order No. 320 Dated June 8, 2005.¹

¹ TWE's Motion was made pursuant to Hawaii Administrative Rules (HAR) §§16-201-16 and 16-201-23. HAR Title 16, Chapter 201 applies to evidentiary contested case hearings, declaratory rules, and rulemaking and is not applicable in this situation. Pursuant to the regulatory power of the Director, HRS §440G-12, the Department nevertheless considered TWE's Motion as a request for the Department to reconsider D&O 320.

- C. By letters dated July 20, 2005, the Department informed TWE and Olelo Community Television (“**Olelo**”), the designated access entity for Oahu, of the opportunity for the parties to submit additional information as to whether Olelo should be provided a 6th access channel.
- D. In the letter, the Department also stated that the public would be given an opportunity to comment on the matter and that it may consider the documentation and comments from the parties as well as previously submitted information.
- E. After careful consideration of the documents and public comments submitted, and of the arguments and positions of the parties, the Department hereby issues the following Order.

II. FINDINGS OF FACT

- A. On June 8, 2005, D&O 320 was issued by the Director, amending section 5.2(a) of the Terms and Conditions of D&O 154, and directing TWE to designate and provide for activation to the Director or the Director’s designee, in this case Olelo, an additional 6th (analog) channel for a one-year period.
- B. Among other things, D&O 320 also provided that Olelo submit a report to the Director within nine (9) months after the 6th channel is made available, which shall include detailed statistics and data reflecting Access Channel utilization and viewership.
- C. On June 17, 2005 TWE submitted Time Warner Entertainment Company, L.P.’s Motion for Reconsideration Or Clarification of Decision and Order

No. 320 Dated June 8, 2005.

D. In its Motion for Reconsideration, TWE requested the Department to reconsider D&O 320 in light of its arguments. TWE argued that the Department overlooked and/or failed to adequately address and consider the following:

1. whether Olelo can utilize existing technology to better manage its existing channels and increase the "distribution and availability" of its clients' messages through other means;
2. the significant impact to TWE and cable subscribers for the provision of a 6th analog channel to Olelo; and
3. should DCCA decline to grant TWE's motion, development and clarification as to specific evaluation criteria, statistics and data reflecting Access utilization and viewership to be required from Olelo following the nine-month trial period.

E. On July 29, 2005, Olelo submitted its Memorandum in Opposition to Time Warner Entertainment Company, L.P.'s Motion for Reconsideration or Clarification of Decision and Order No. 320 Dated June 8, 2005 (Opposition Memorandum).

F. In its Opposition Memorandum, Olelo argued that TWE's motion should be summarily dismissed since it did not provide any new information that could not have been presented in its prior submissions. Olelo also asserted that:

1. the motion should be denied on its merits since TWE ignored the fact that if Olelo were to use alternative technologies, not all cable subscribers have access to the necessary equipment and services (i.e., hardware or internet broadband connections) since only cable broadcasting reaches all cable subscribers;
 2. TWE did not present credible evidence that it would suffer "significant harm" with the activation of a 6th analog access channel; and
 3. Olelo had no objection to the Department clarifying the specific evaluation criteria to be used after the nine-month trial period but preferred that such criteria be the product of negotiation between the Department, TWE and Olelo.
- G. On July 29, 2005, TWE also submitted a letter to the Department indicating that it did not have any further comments with respect to its Motion for Reconsideration at that time; however, it reserved the right to respond to Olelo's submission.
- H. By letters dated August 2, 2005, the Department requested that the parties provide responses to each other's submissions dated July 29, 2005. TWE was also asked to provide additional information on its channel line-up should the 6th PEG channel to Olelo be implemented and also to describe specifically which existing ubiquitous and practical technology can be utilized by Olelo to maximize distribution of its programming.

- I. On August 8, 2005, the Department received reply comments from both TWE and Olelo.
- J. In its Reply to Olelo's Memorandum in Opposition, submitted on August 8, 2005, TWE reiterated that Olelo could utilize internet technology in the distribution of its programming and more particularly, maintained that webcasting was suitable to distribute repeat programming; and argued that Olelo had failed in its burden to provide information demonstrating subscriber demand for an additional PEG channel.
- K. In its Reply dated August 8, 2005, Olelo chose to stand on its previous communication.
- L. On the Department's web page, a Notice for Public Comments on TWE's Motion for Reconsideration and the documents submitted by the parties were posted on August 12, 2005. Interested persons were requested to submit comments to the Director by August 26, 2005.
- M. As a result the Department received more than 25 emails and letters timely submitted from interested persons as to whether Olelo should be granted a 6th Access channel.
- N. Over the course of the next several months, TWE and Olelo continued to discuss and attempt to negotiate resolution of their differences and to develop possible alternatives to the 6th analog access channel. During the course of the negotiations, TWE offered to provide Olelo, in lieu of an additional analog channel, digital channel capacity, technology and services. Olelo expressed an interest in pursuing this option, and the

Department encouraged the parties to exchange information and attempted to facilitate resolution of the outstanding differences.

- O. Based upon discussions with TWE, the Department emailed Olelo on November 16, 2005 and outlined TWE's offer to Olelo which included, among other things, one (1) digital channel, three (3) digital channels for video-on-demand (VOD) programming, free digital set top boxes, two hundred (200) server hours and a digital channel for statewide legislative programming during session.
- P. In an email to the Department on November 23, 2005, Olelo set forth its objections to TWE's offer as follows:
1. An additional analog channel will reach more viewers even if TWE offered free digital converter boxes since an analog channel can reach ninety percent (90%) of Oahu television viewers while digital channels serve less than fifty percent (50%) of viewers;
 2. Olelo can support an analog channel without much added cost. To support VOD channels, Olelo would be required to invest in encoding hardware, server capacity and additional staff;
 3. In addition there are other technical issues (i.e., digital transport, storage and menuing, adequate turnaround time for encoding time-sensitive programming) that were problematic;
 4. TWE's offer of two hundred (200) hours of VOD storage and minimal staff support is insufficient to meet Olelo's needs; and

5. Viewership data provided by TWE was based on digital subscribers and needed to be put in context with analog subscribers.

Q. By email dated November 30, 2005, TWE confirmed its offer to Olelo in writing, which included digital spectrum capacity in lieu of the provision of a 6th analog channel. TWE proposed the following terms:

1. one (1) digital channel for Olelo's direct feed to TWE;
2. three (3) digital channels for **VOD** programming, with a TWE server capable of storing two hundred (200) hours of programming under Olelo's management. Olelo may add additional server capacity through a server that it has already committed to purchase;
3. TWE assistance in converting analog programming to digital for a mutually-agreeable time frame and Olelo would handle the conversion thereafter;
4. TWE will provide the data line to transport programming from Olelo to TWE's server;
5. TWE will provide, at no charge, digital converters to all analog subscribers throughout the State of Hawaii who request a digital converter for the purpose of viewing Olelo's programming; and
6. TWE will provide a digital channel for the state-wide broadcast of state legislative proceedings during the legislative session.

R. On December 8, 2005 Olelo rejected TWE's November 30, 2005 written proposal and commented on its provisions as follows.

1. A 6th analog channel will better satisfy Olelo's obligation to provide its producers with equitable exposure for their programs.
2. Currently less than fifty percent (50%) of subscribers have access to digital cable service, and there are some geographical areas without access to VOD services;
3. Encoding programs for VOD programming would entail major added equipment and staffing costs. Olelo estimated that each hour of VOD programming would take 1.5 hours of staff time. In addition multiple encoders and additional servers would be needed to convert and then store the encoded programs and meta data that would then be sent to TWE;
4. TWE's offer of a dedicated fiber connection would provide an effective transport option; however, the transport format, necessary equipment, location and responsibility for the costs are unclear;
5. TWE's offer of two hundred (200) hours of digital VOD storage for three (3) VOD channels constitutes only a week's worth of local PEG programming. Olelo believes that PEG programming should be available on demand for at least one to two months. Olelo planned to add an additional server, but it was part of its replacement automation system for the analog channels and cannot be used for VOD storage. If Olelo were required to purchase an additional server for VOD storage, it would cost an

estimated twenty thousand dollars (\$20,000) to thirty thousand dollars (\$30,000) for 1,400 hours;

6. TWE makes no reference to the promotion of the availability of the digital converter boxes to all analog subscribers. Promotion of free digital boxes and the proposed digital channels is important so that viewers would be informed of the new services. Olelo and TWE did not have sufficient time to explore this concern;
 7. Olelo welcomed TWE's offer of a statewide digital channel for the broadcast of state legislative proceedings but asked that the scope be broadened to include any programs with statewide significance and statewide VOD capability;
 8. Although an improvement over the original proposal, TWE's offer of three (3) VOD channels still does not adequately meet the needs for all local PEG access programming; and
 9. While TWE's offer is state-of-the-art and of future value, Olelo is concerned with the situation at this point in time, not in the future. In the interest of equity for its producers and presenters, Olelo is seeking a 6th analog channel.
- S. In an email dated December 21, 2005, TWE responded to Olelo's email of December 8, 2005 as follows:
1. Olelo failed to provide facts or evidence that a 6th analog channel will provide more equitable exposure to producers than three (3) digital VOD channels.

2. With VOD, Olelo's constituents will have greater control over the programs that they wish to see and when they wish to see them as opposed to a 6th analog channel that would allow Olelo to control the broadcast times of programs.
3. TWE has offered to make free digital boxes available to all subscribers, statewide, for the purpose of viewing Olelo's programming and the legislative channel programming. To publicize this offer, Olelo only needs to add a "crawling" text message on its existing analog channels.
4. TWE asserts that all residential areas have access to full digital services.
5. TWE would do the encoding for the non-VOD digital channel and the legislative channel at its expense and at no cost to Olelo, who would only bear the cost of encoding programming and managing the three (3) VOD digital channels. Although there are costs for Olelo to encode and create the metadata (index), subscribers would benefit substantially from the ability to search and access programs residing on a VOD server, resulting in increased access to Olelo's programming.
6. The purpose of VOD programming is not to show all shows all of the time and to keep the programming on VOD for months. VOD programs must be managed so that the content remains fresh and subscribers will want to view new programs at their convenience.

Keeping the same and numerous programs on a VOD channel defeats the purpose of having a VOD. TWE submits that Olelo's request for 1,400 hours of VOD programming would be impossible to manage and impossible to navigate by subscribers. The purpose of VOD channels is not to merely mirror the content of the analog channels but to give subscribers greater convenience and access to Olelo's programming.

7. TWE is willing to consider the broadcast of government proceedings that have state-wide significance but cannot formally commit to this without more information.
8. TWE will be forced to remove an existing analog channel to the detriment of analog subscribers should the Department affirm D&O 320.

III. CONCLUSION

- A. The Department finds that TWE's proposal of digital channels, technology and services as set forth in its email of November 30, 2005, offers Olelo a promising alternative to a 6th analog access channel. It would also position Olelo for future digital requirements.
- B. However, at this point in time, the Department finds that Olelo's position that TWE's proposal does not adequately address the needs of its producers, presenters and viewers has merit.
- C. The Department has considered the existing technology and new delivery systems (including but not limited to, the digital channels and VOD) but

finds that a 6th analog channel will reach more Oahu viewers even if TWE offers free digital converter boxes to those who request them. The Department believes that relatively few viewers would take advantage of the offer, because of the inconvenience of having a new box installed.

- D. While VOD programming is attractive, the Department agrees with Olelo's claims that the more advanced technology would result in additional cost in staffing and equipment, and this would reduce the benefits of such programming for Olelo.
- E. The Department further finds that an additional analog channel will provide Olelo more prime time hours to schedule first-run programming. However, the Department notes that the scheduling of prime time hours may still pose a problem for Olelo so long as it continues its present policy of repeat programming during prime time hours, and that this is an issue which Olelo should address.
- F. The Department permitted TWE and Olelo to explore alternatives to a 6th analog channel, and it took some time for the parties to exchange information and discuss the particulars of TWE's proposal. This process resulted in a delay in the implementation of the provisions of D&O 320 with regard to a 6th analog channel, and hence, the Department has determined that TWE shall designate and provide for activation to Olelo a 6th analog channel within forty-five (45) days of the date of this order.
- G. The Department is in accord with the request of TWE to provide clarification to D&O 320 regarding the specific criteria that the Department

will use in determining whether a 6th channel is justified after the nine month trial period.

- H. The remaining arguments raised by TWE in its Motion for Reconsideration were either already raised, or could have been raised by TWE in connection with Olelo's original request for a 6th PEG access channel, and thus, do not provide a basis for reconsideration.

IV. ORDER

- A. Accordingly, the Department has reconsidered D&O 320 in light of documents and public comments submitted, and the arguments and positions of the parties. After careful consideration and deliberation, the Department hereby reaffirms its order of a 6th analog channel as stated in D&O 320 with the following clarification and amendments:

1. Paragraph IV. A.(a)(1) of D&O 320 is amended to read as follows:

TWE shall also designate and provide for activation to the Director or the Director's designee an additional analog channel ("6th Access Channel") for a one-year period, commencing within forty-five days of the date of this Order. TWE shall confirm in writing to the Department that the 6th Access Channel is available for programming.

2. Paragraph IV. A.(a)(3) of D&O 320 is amended to read as follows:

Nine (9) months after the 6th Access Channel is available for programming, the designated access entity shall submit a report to the Director that shall include detailed statistics and data reflecting Access Channel utilization and viewership. The report shall include statistical data normally contained in

the designated access entity's annual report, an assessment of its current repeat programming policies (including prime time airings as well as total hours), and whether changes in those policies are appropriate, and a survey of its clients of how beneficial the 6th access channel has been. The designated access entity shall consult with the Department prior to compiling the data for this report to ensure that the report contains information necessary for review by the Department.

In addition, the Department directs that the designated PEG access organization shall gather viewership statistics on its six (6) access channels. The designated PEG access organization shall report to the Department at the end of the nine month period described above, with the viewership statistics on its access channels.

- B. Except as otherwise provided in this Order, the remaining provisions of Decision and Order No. 154 (including but not limited to section 5.2) as amended by Decisions and Orders Nos. 156, 158, 243, 261, and 320, shall continue to remain in full force and effect.

Dated: Honolulu, Hawaii, December 28, 2005

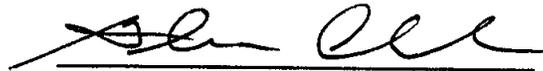


MARK E. RECKTENWALD
Director of Commerce and
Consumer Affairs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 326 was served upon the following party at the address shown below by mailing the same, postage prepaid, on December 28, 2005.

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